IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 17 OF 1995

Shamrao Malsidha Kale,
Age 42 years,
Occ. Agricultrist
R/o. Mandrup, Tal. South Solapur
Dist. Solapur
(At present in Yeroda
Central Prison, Pune) ...Appellant.

Versus

The State of Maharashtra ...Respondent

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Shri. T.E. Mane, Advocate for the appellant.

Shri. A.S. Shitole, A.P.P. for Respondent.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 10TH SEPTEMBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant challenges the judgment and order dated 5.12.1994 passed by the learned V Additional Sessions Judge, Solapur in Sessions Case No. 135 of 1994. By the said judgment and order, the appellant has been convicted for the offence under Section 304 Part-II of I.P.C. and sentenced to R.I. for five years.

2. In short the prosecution case is as under:-

. That the appellant-accused was married to deceased Nirmala about 10 years prior to the incident. Initially Nirmala and the appellant resided at village Mandrup. Thereafter, the appellant and Nirmala went to reside at Solapur in Huccheshwarnagar. During the stay at Solapur one day Nirmala returned home late, on account of this the appellant beat Nirmala as he suspected Nirmala of having an affair with some other person. Nirmala went to her mother's house and narrated this incident to her mother. Her mother P.W.7 Nagarbai Bansode reported this incident to P.W.8 Nivrutti Kamble, P.W.11 Pandurang Tale and some other respectable persons in the area. They all proceeded to the house of the appellant and persuaded him saying that Nirmala is a woman of proper behaviour and requested the appellant that he should not harass Nirmala and he should treat her properly. Thereupon, the appellant accepted Nirmala. Thereafter, again the appellant and Nirmala went to reside at Mandrup. Again Nirmala informed her mother that the appellant suspected her fidelity and harassed her on that count. Few weeks prior to the incident, Nirmala had been to Solapur for medical check-up from doctor Bagewadikar as she was pregnant. At that time, she told her mother that she was being harassed by the

appellant and she would not return to the house of the appellant. However, her mother persuaded her saying that she had two sons, hence, she should return to the house of the appellant. On this, Nirmala returned to her matrimonial house. In the next month police came to the house of Nagarbai Bansode and informed her that her daughter had been murdered by the appellant.

. P.W.5 Police Patil Ashok Pandhare of village Mandrup has stated that on 7.5.94 at about 3.00 p.m. he was standing near old S.T. Stand at Mandrup, the appellant came there running. The appellant was gasping and he was frightened. The appellant informed him that his wife Nirmala was having illicit relations with one Ogyappa Kale who is his relative. He persuaded Nirmala to abstain from such relationship but she did not give any heed to the same. The appellant further informed that his parents and son had been to Solapur to attend a marriage and only he, his wife and youngest child were in the house. The appellant stated that he told Nirmala to bring to an end the relationship with Ogyappa Kale as he was defamed in society on that count. However, Nirmala angrily told him that she was not ready to end the relationship with Ogyappa Kale and Nirmala told the appellant that she and Ogyappa Kale will cohabit as

husband and wife and threatened that they will kill the appellant. On hearing this, the appellant became angry and he inflicted a blow with Pahar on her head. Thereupon, Police Patil Shri. Ashok Pandhare requested a jeep driver P.W.6 Sunil Patil to take him and appellant by jeep to the spot. On entering the hut of the appellant, P.W.7 Ashok Patil saw that Nirmala was lying dead on a gunny bag in a pool of blood. He also saw a Pahar lying nearby. It was stained with blood. There were blood stains on the clothes which were on the person of the appellant. Thereafter, Police Patil brought the appellant to Mandrup police station and he lodged a complaint (Exh.25). Thereafter, investigation commenced. Body of Nirmala was referred for post mortem. P.W.4 Dr. Sanjay Sawant performed post mortem on Nirmala. He saw one injury on the body of Nirmala which extended from the centre of the forehead upto left side of occipital region. In the opinion of Dr. Sawant, the deceased died because of head injury i.e. fracture of the skull with injury to brain. In the opinion of doctor, injury was possible due to Article Exh.'D' i.e. Steel Pahar. After completion of investigation, charge sheet came to be filed.

3. In due course, the case was committed to the

Court of Sessions. During the course of trial, charge came to be framed against the appellant U/sec. 302 of I.P.C. The appellant-accused pleaded not guilty to the said charges and claimed to be tried. His defence is that of denial and false implication. During the course of the trial, the prosecution examined in all 12 witnesses. Relying on the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellant as stated in para 2 of this judgment. Hence, this appeal.

4. I have heard Shri. Mane, the learned advocate for the appellant and Shri. Shitole, the learned A.P.P. for the respondent-State. I have also perused the entire evidence on record as well as the judgment and order of the learned Sessions Judge. After carefully considering all the material, I have reached the conclusion that the learned Sessions Judge has rightly convicted the appellant for the offence under Sections 304 part-II of I.P.C.

5. The evidence on which the conviction of the appellant is founded can be classified under three heads i.e.:-

i) Evidence of witnesses who have stated that there was ill-treatment, harassment and beating to deceased Nirmala at the hands of the appellant. These witnesses are P.W.7 Nagarbai Bansode, P.W.8 Nivrutti Kamble and P.W.11 Pandurang Tale.

ii) Evidence of P.W.5 Ashok Pandhare, police patil to whom the appellant made confession.

iii) Evidence of P.W.3 Yallappa Girgaon who has deposed about the seizure of blood stained clothes which were on the person of the appellant.

6. P.W.7 Nagarbai Bansode is the mother of deceased Nirmala. She has stated that her daughter Nirmala was married with the appellant approximately 10 years prior of the incident. After marriage, Nirmala resided with the appellant for few months at village Mandrup. Then she resided with the appellant at Solapur in Huccheshwarnagar. Thereafter, again Nirmala

resided with the appellant at village Mandrup. Nagarbai Bansode has stated that when Nirmala was resided with the appellant at Huccheshwarnagar in Solapur, at that time, once Nirmala had returned home late at night, hence, the appellant beat her. Thereafter, Nirmala came to the house of this witness and reported that the appellant beat her on account of suspicion as she came late. Thereupon this witness has contacted some respectable persons in her area and told them about what was reported by Nirmala. Two of the said witnesses are P.W.8 Nivrutti Kamble and P.W. 11 Pandurang Tale. Then these panchas i.e. P.W.8 Nivrutti Kamble who is the President of Harlayya Samaj Trust to which community Nagarbai Bansode, appellant and P.W.8 belong and P.W.11 Pandurang Tale who was the Secretary of the said Trust, went to the house of the appellant and persuaded him saying that Nirmala was a woman of proper behaviour. They requested the appellant not to harass and beat Nirmala and he should treat her properly. Thereupon, the appellant accepted Nirmala. The appellant and Nirmala stayed at Solapur for a few months, thereafter, they went to reside at Mandrup.

. Nagarbai Bansode has stated that thereafter, her daughter Nirmala came to see her on many occasions and Nirmala told Nagarbai that the appellant beat

and harassed her as he suspected her fidelity. Thereafter, Nagarbai has stated that Nirmala was pregnant, hence she went for medical check-up from doctor Bagewadikar. Nagarbai has stated that at that time Nirmala started crying and weeping and saying that she was being severely harassed by the appellant and she will not return to the house of the appellant. However, Nagarbai persuaded Nirmala saying that she had two sons, under these circumstances she should return. Thereupon, Nirmala returned to the house of the appellant. Thereafter, in the next month, police came to the house of Nagarbai and informed her that her daughter has been murdered. P.W.8 Nivrutti Kamble who was the President of Harlayya Samaj Trust and P.W.11 Pandurang Tale who was the Secretary of the said Trust, both have corroborated the evidence of Nagarbai. As far as the incident of Huccheshwarnagar is concerned wherein the appellant had beaten Nirmala, nothing has been elicited in the cross examination of P.W.7 Nagarbai Bansode, P.W.8 Nivrutti Kamble and P.W.11 Pandurang Tale so as to disbelieve their testimony. Their testimony establishes that the appellant suspected that Nirmala was having an affair with some one and on this count he beat and harassed Nirmala. From the evidence of Nagarbai and other witnesses, the motive for the appellant to commit crime has been

established. The motive was that the appellant was suspecting that his wife was having an affair with another person. On the count of harassment and ill-treatment to Nirmala or the incident which occurred a few days prior to the incident, the evidence of Nagarbai has not been shaken in her cross examination. I find her evidence to be reliable and trustworthy.

7. The prosecution has examined P.W.5 Ashok Pandhare who is the complainant in the present case. He is the Police Patil of village Mandrup. He has stated that on 7.5.94 at about 3.00 p.m. he was standing near old S.T. stand at Mandrup, the appellant came there running. The appellant was gasping and he was frightened. The appellant informed him that his wife Nirmala was having illicit relations with one Ogyappa Kale who is his relative, he persuaded Nirmala to abstain from such relationship but she had not heed his request. The appellant further informed that his parents and son had been to Solapur to attend a marriage and only he, his wife and youngest child were in the house. The appellant stated that he told Nirmala to bring an end to the relationship with Ogyappa Kale as he was defamed in society on that count. However, Nirmala angrily told him that she was not ready to end the relationship with Ogyappa Kale and Nirmala

threatened the appellant that she and Ogyappa Kale will cohabit as husband and wife and that they will kill him. On hearing this, the appellant became angry and he inflicted a blow with Pahar on her head. Thereupon, police Patil Shri. Ashok Pandhare requested a jeep driver P.W.6 Sunil Patil to take him and appellant by jeep to the spot. On entering the hut of the appellant, P.W.7 Ashok Patil saw that Nirmala was lying dead on a gunny bag in a pool of blood. He also saw a Pahar lying nearby. It was stained with blood. There were blood stains on the clothes which were on the person of the appellant. Thereafter, Police Patil brought the appellant to Mandrup police station and he lodged a complaint (Exh.25). The prosecution has relied on the confessional statement made by the appellant to Police Patil. However, it is clear that P.W.5 Ashok Pandhare is the police witness and as such confession made by the appellant to him cannot be used against the appellant by the Court.

8. The other evidence which connects the appellant with the crime is the attachment of blood stained clothes which were on the person of the appellant at the time of arrest. P.W.3 Yellappa Girgaon has deposed on this aspect. Yellappa Girgaon has not been shaken in his cross examination. The clothes

were sent to the chemical analyser and it was found that the shirt (Article 13/5) and Pant (Article 13/6) of the appellant were found to be stained with blood of 'B' group. The blood group of Nirmala was also sent for analysis and it was found to be that of 'B' group. Thus finding of the said stains on the clothes of the appellant immediately after the incident is another incriminating circumstance which would go against him.

9. One another circumstance against the appellant is that Nirmala was found dead in the house of the appellant. The appellant and Nirmala were poor persons i.e. labourers. Hence, there is no question of anyone entering in their hut in order to rob them during which incident Nirmala could have received injuries and died. There is no material to show that any incident of robbery had taken place in the hut of the appellant wherein Nirmala could have been injured. This is also supported by the fact that on the dead body of Nirmala a gold Mangalsutra, gold ear rings, gold Morni and silver Jodvi were found. Therefore, assault by robber can definitely be ruled out. No material has been brought on record to show that any person had enmity with Nirmala so as to do away with Nirmala. As Nirmala was found dead in the matrimonial house i.e. in the house of the

appellant, it is for the appellant to provide explanation as to how Nirmala died. In fact in the present case, the appellant has given an explanation which has come in the evidence of Police Patil. However, that explanation being in the nature of confession to a police witness the said evidence cannot be read against the appellant. P.W.5 Ashok Pandhare has deposed that on 7.5.94 at about 3.00 p.m. he was standing near old S.T. Stand at Mandrup, the appellant came there running. The appellant was gasping and he was frightened. Thereafter, the appellant gave certain information to P.W.5. On hearing information Police Patil Shri. Ashok Pandhare requested a jeep driver P.W.6 Sunil Patil to take him and appellant by jeep to the spot. On entering the hut, P.W.5 Ashok Patil saw that Nirmala was lying dead inside the hut on a gunny bag in a pool of blood. Looking to all the evidence on record, it can be safely concluded that it was the appellant who was responsible for the death of Nirmala.

10. The next question which arises before me is the quantum of sentence to be imposed upon the appellant. Shri. Mane, the learned advocate for the appellant has submitted that the act was committed by the appellant under grave and sudden provocation and hence, the sentence of the

appellant may be reduced to the period already undergone by the appellant. In this connection, Shri. Mane, the learned advocate for the appellant has placed reliance on the evidence which has come on record that on the day of the incident, the appellant tried to persuade Nirmala to discontinue her illicit relationship, however, Nirmala did not listen to him and on the contrary Nirmala told the appellant that she would reside with her paramour as husband and wife and that they would kill the appellant. On hearing this, the appellant took up Pahar which was lying in the hut and gave a blow on the head of Nirmala. From the evidence of Dr. Sawant, I have noticed that there is only one injury on the head of Nirmala. From the evidence on record it is also seen that the act of the appellant was on account of grave and sudden provocation by deceased Nirmala herself by her conduct at the relevant time. Considering the basic human nature, any man is bound to loose his senses when his wife refuses to discontinue her affair with another man and states to her husband that she will reside with her paramour as husband and wife and they would kill the appellant. The appellant is otherwise a respectable person and he cannot be equated with a hardened criminal or notorious criminal. The appellant has old parents and three children who are solely dependant on him.

11. Shri. Mane, the learned advocate for the appellant has placed reliance on the decision of this Court in the case of **Bibhinshan Yadav Deshmukh Vs. The State of Maharashtra in Criminal appeal No. 493 of 1995 decided on 6th October, 1995 (Coram: Vishnu Sahai, J.).** In the said case the appellant therein has killed his wife as well as paramour on account of grave and sudden provocation. In the said case the conviction was maintained under Section 304 part II of I.P.C. but the sentence was reduced to one and half years. Shri. Mane, has further submitted that the appellant has been in custody for almost a period of one year and hence, the sentence may be reduced to the period already undergone by the appellant.

12. Looking to all these facts, though the conviction under Section 304 part II is maintained, the sentence of imprisonment is reduced to the period already undergone by the appellant. The appellant is on bail, his bail bonds stand cancelled. Criminal appeal is partly allowed.